Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

SECOND AVENUE LIMITED DIVIDEND HOUSING ASSOCIATION, et al,

Petitioners,

v. No. 76-670

CARLA ANDERSON HILLS, Secretary, Department of Housing and Urban Development, et al,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

JURISDICTION

This appeal is taken pursuant to 28 U.S.C. §1254(1) and is supported by the Petition for Writ of Certiorari filed with this Court, in conformity with Rule 53 of the U. S. Supreme Court and 28 U.S.C. §1915, on August 19, 1976. Accompanying the petition were Petitioner-Appellant Second Avenue Limited Dividend Housing Association's ("Second Avenue") Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements. Simultaneously with the aforementioned filing, copies of Petitioners' Petition for Writ of Certiorari and accompanying papers were served on all counsel for Respondents.

On August 24, 1976, Petitioners' counsel sent a letter to Mr. Michael Rodak, Jr.,

Clerk of this Court, to evidence prior telephone conversations of August 12 and August 20, 1976, and to confirm the procedure available to Petitioners by reason of the filing of Second Avenue's Motion for Permission to Proceed In Forma Pauperis. The Clerk of this Court advised that the Petition for Writ of Certiorari would be dated as of August 20, 1976 and that in the event this Court denied Second Avenue's Motion for Permission to Proceed In Forma Pauperis, this Court would notify Petitioners as to the amount of time in which they would be given to re-submit their Petition for Writ of Certiorari in compliance with the Rules as to the form of the petition.

Under date of October 4, 1976, the Clerk of this Court advised counsel for Petitioners that "The motion for

petitioners leave to proceed in forma pauperis or in the alternative to dispense with printing the petition is denied" without specifying any time from the date of the entry of the order in which Petitioners had to file a petition which conformed to Rule 39.

On November 12, 1976, Petitioners refiled their Petition for Writ of Certiorari in conformity with Rule 39.

COUNTER-SUPPLEMENTAL STATEMENT OF THE CASE

Although Petitioners deem their petition adequate, they think that it is desirable to reply to Respondent Michigan State Housing Development Authority's ("MSHDA") inaccuracies, omissions and misstatements in its "Statement of the Case."

For a correct statement of the case, Petitioners refer this Court to their Statement of the Case in their Petition.

MSHDA states that it loaned to Second

Avenue $1,798,000.00 in 1972. (MSHDA Br. p. 4). However, in truth, HUD and MSHDA committed to loan to Second Avenue $1,798,000.00, but disbursed only $908,539.53 as admitted in MSHDA's Complaint for Foreclosure. Less than one-third of the disbursed sum was paid to or on behalf of Second Avenue for rehabilitating the Second-Hendrie Project. The balance of the loan commitment has not been disbursed and MSHDA's failure and refusal to disburse the balance of the loan commitment is one of Petitioners' causes of action alleged in Count II of the First Amended Complaint.

MSHDA asserts that the charges in the First Amended Complaint "were first contained in a counterclaim filed in response to a complaint filed in the Wayne County Circuit Court." This

statement is untrue. A comparison of the First Amended Complaint with the Counterclaim and Complaint filed in the District Court below clearly reveals that the Counterclaim and Complaint alleges different causes of action, involves different parties plaintiffs, and was predicated on different legal theories.

Furthermore, MSHDA acknowledges that the Authority's important public function includes the raising of money by the sale of bonds and notes to make loans to finance the construction and rehabilitation of housing for persons of low or moderate income. (MSHDA Br. p. 4). However, the gravamen of Petitioners' action below was the disputes between Second Avenue, the sponsor and developer of the Second-Hendrie Project et al, an all Black group, and the overwhelmingly white administered federal and state respondents.

Substantial issues on appeal result from an attempt by the federal judiciary to resolve the controversy between the parties by becoming embroiled in the racial passions raised by the cases below and by predicating their decision, in substantial part, on political, economic and social concerns and interests of MSHDA and Federal Respondents which were not contained in the pleadings on which the courts purported to base their judgment. See Petition at pp. 63 - 64.[1/]

To the contrary, MSHDA and Federal Respondents' past and present actions have resulted in racially discriminatory housing practices affecting at least 13,247 units of multi-family housing in the Metropolitan Detroit area as of December 31, 1974. Approximately 23% (3,000) units were

[1/] Also, see Appendix to Petition, p. 12.

located within the ghetto areas of the City of Detroit. Of the total MSHDA assisted projects in default, MSHDA instituted foreclosure of only one project, namely: Second-Hendrie Project. Of the 260 Section 236 Projects in the Metropolitan Detroit area, 99 (or 38% as of 1975) were in some stage of default and another 46 (or 18%) had financial difficulties. Of the 169 Detroit MSHDA/HUD projects, in 1975, 69% were in default. (Paragraph 48 of First Amended Complaint).

The manner in which Federal Respondents and MSHDA have carried out their important public functions are exemplified by a series of newspaper articles published by the Detroit News.

In the Friday, January 7, 1977 issue of the Detroit News (Sixth in a series), captioned "A $33-million Housing Waste" staff writers David Ashenfelter and Clark Hallas reported that:

> "Federal housing officials have a perfect batting average with 'Operation Rehab.'
> Zero.
> Of 24 Detroit inner-city apartment projects rehabilitated in the $33.2-million program:
> -Six were never finished.
> -Thirteen either have been repossessed -- or eventually will be -- because their owners quit paying their federally insured mortgage notes.
> -Five more are operating in the red and will crumble to ruins long before their 40-year mortgage notes are paid off, according to federal officials.
> By the time the U.S. Department of Housing and Urban Development (HUD) finishes counting the losses, the waste probably will top $30 million.
>
> * * *
>
> It was a social rip-off,' says Robert Koenig, loan

> management chief of HUD's Housing Management Division in Detroit.
> 'People's hopes were raised, then dashed by the program. In the long run, the social losses will be the more costly part of the equasion.
>
> * * *
>
> HUD didn't monitor the work, or provide full-time construction aid, he [Robert Koenig] said.
>
> * * *
>
> Councilman Hood says his projects ran into trouble because HUD deliberately under-capitalized them.
> 'I think it was part of a grand plan to get the buildings off the hands of their white slumlords and turn them over to blacks who thought they were getting something and were left holding the bag,' he said."

Messrs. Ashenfelter and Hallas further wrote in the Tuesday, January 4, 1977 issue of the Detroit News (Third in a series)

entitled "HUD Mired in Own Mistakes,"

that:

> "And, although federal auditors repeatedly told the U.S. Department of Housing and Urban Development (HUD) to clean up its act, a congressional committee investigating the agency's housing fiasco claims the biggest problem is that its policy-makers don't listen to advice.
>
> Federal audits which are two, three or four years old 'read like they were written only yesterday,' the House Committee on Government Operations complained recently.
>
> 'For too long,' the committee noted, 'the department has tolerated inefficiency, conditions conducive to corruption and exploitation of its programs.'

* * *

Nearly one-third of the 684 Detroit-area apartment projects are on the financial ropes and 100 probably will fair, costing the taxpayers from $104 million to $182 million. That doesn't count $20 million already

lost.

Nationally, the losses already have topped $141 million, while $5.8 billion worth of projects are in trouble.

* * *

-Tenants in low-income projects were paying higher rents and getting less for their money than tenants in conventional projects. HUD sloppiness caused low-income tenants to pay rents 59 percent to 93 percent more than tenants in conventional housing.

* * *

-Most HUD field offices routinely overestimated project income and underestimated expenses, driving many projects broke before they opened. That's a key reason why all 24 of Detroit's 'Operation Rehabilitation' projects, renovated under a special subsidy program, are failing."

In the Wednesday, January 5, 1977 issue of the Detroit News (Fourth in a series), captioned "Young one of HUD Defaulters," Messrs. Halles

and Ashenfelter reported that:

> "Four apartment buildings which Young's Eastside Development Corp. acquired and rehabilitated in 1971 and 1972 have been seized by federal housing authorities for failure to make mortgage payments.
>
> * * *
>
> Nationally, losses will be in the billions.
> Ironically, Young has been a strong critic of HUD and, at one time, President-elect Jimmy Carter considered him as a candidate to run the department. Young said he removed himself from contention for the Cabinet appointment."

In contrast, the Sunday, January 9, 1977 issue of the Detroit News (Eighth in a series), captioned "How a bad Deal Ripped off HUD," Messrs. Ashenfelter and Hallas reported that:

> "Henry Ford II and Flint millionaire C. S. Harding Mott have at least two things in common with the U.S.

> Department of Housing and Urban Development:
> 1. Maurice B. Frank, a wheeler-dealer from Palm Beach, Fla.
> 2. Mansion House Center, the $45-million luxury apartment complex which Frank has succeeded in ripping off at public expense.
>
> * * *
>
> But instead of foreclosing on the project and auctioning it to the highest bidder -- which would have resulted in a projected $7-million loss and ended the tax shelter -- HUD let the owners continue to run it.
>
> * * *
>
> The partnership consisted of Henry Ford II; his brother, Benson; his daughters, Charlotte Ford and Anne F. Uzielli; his sister, Josephine; and his mother, the late Eleanor Clay Ford.
>
> * * *
>
> HUD attorney William G. Dunnells helped Frank persuade the agency to postpone mortgage payments for the next five years (until Aug. 31, 1977) so the project could get

into the black. Six months later, Dunnells quit HUD and went to work for Frank on a $2,500 monthly retainer.

* * *

The grace period added $9 million in interest to the mortgage, boosting HUD's liability to $45 million."

ARGUMENT

I

THE BRIEF OF RESPONDENT MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY IN OPPOSITION WAS NOT FILED TIMELY

Michigan State Housing Development Authority ("MSHDA") filed its Brief under date of December 15, 1976. As admitted by MSHDA in its Brief, the Petition for Certiorari, as conformed to Rule 39, was docketed in this Court on November 12, 1976. MSHDA's thirty day period in which to file its opposition brief expired

on December 12, 1976.

The period in which MSHDA may have filed its brief in opposition to the Petition for Writ of Certiorari has not been enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 34.5.

Accordingly, MSHDA's Brief in Opposition to Petitioners' Petition for Writ of Certiorari was not timely, and should not be considered by this Court.

ARGUMENT

II

SINCE THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED, THIS COURT HAS JURISDICTION OF THIS APPEAL

In the case below, a timely Petition for Rehearing <u>En Banc</u> was denied by the Court of Appeals for the Sixth Circuit

on May 25, 1976. On August 19, 1976, Petitioners filed their Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements in full conformity with Rule 53 of the Revised Rules of the Supreme Court of the United States and 28 U.S.C. §1915.

It is the well-settled law of this Court that a timely petition for re-hearing tolls the running of the ninety day period prescribed in 28 U.S.C. §2101(c) in which a petitioner may apply to this Court for a Writ of Certiorari. Department of Banking v. Pink, 317 U.S. 264, 266 (1942); Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149-150 (1942); Foreman v. United States, 361 U.S. 416, 426 (1959); United States v. Healy, 376 U.S. 75, 77-80 (1964).

In the case before this Court, the ninety day period did not expire until August 24, 1976.

The Petition for Writ of Certiorari being actually filed on August 19, 1976, was timely. Therefore, the Federal Respondents and MSHDA's contentions of untimeliness are clearly frivolous.

In the instant case, Petitioners followed the instructions of the Clerk of the Court in the preparation and filing of Second Avenue's Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements, which were accompanied by a Petition for Writ of Certiorari. (Petitioners' Reply, pp. 1 and 2, supra). The Clerk's instructions were clearly in accordance with the principles of

Snider v. All State Administrators, Inc., 414 U.S. 685, 39 L.Ed.2d 90, 94 S.Ct. 771 (1974).

Although the Clerk of this Court advised Petitioners that this Court would enter its order upon the disposition of Second Avenue's Motion for Leave to Proceed In Forma Pauperis and Motion for Order Dispensing of Printing Requirements stating the time in which Petitioners would be required to file a petition in conformity to Rule 39, the Court did not do so. Accordingly, since Petitioners re-filed their Petition for Writ of Certiorari in conformity with Rule 39 within thirty-six days after the entry of the Order by this Court denying Second Avenue permission to proceed in forma pauperis or in the alternative to dispense with printing

the petition, Petitioners acted within a reasonable period of time. Cf. Snider v. All State Administrators, Inc., supra; Maness v. Meyers, 415 U.S. 909, 39 L.Ed.2d 464, 94 S.Ct. 1403 (1974); Martin-Trigona v. Supreme Court of Illinois, 415 U.S. 910, 39 L.Ed.2d 465, 94 S.Ct. 1404 (1975).

Assuming arguendo that Petitioners' re-filing of the Petition for Writ of Certiorari on November 12, 1976 was not treated as being filed retroactive to August 19, 1976, the telephone conferences with the Clerk of this Court and Petitioners' letter in conformity thereof constituted in substance the granting by the Clerk of this Court of an extension of time in which Petitioners could re-file their Petition for Writ of Certiorari in conformity with Rule 39. Supreme Court Rule 34.4

and .5. Also cf. Morningside Renewal Council, Inc. v. Atomic Energy Commission, 414 U.S. 1153, 39 L.Ed.2d 106, 94 S.Ct. 909 (1974). Thus, Petitioners' Petition for Writ of Certiorari was filed timely and in complete conformance with Rule 53 of the Revised Rules of the United States Supreme Court, 28 U.S.C. §1915 and 2101(c).

ARGUMENT

III

PETITIONERS HAVE SHOWN SUBSTANTIAL BASIS FOR GRANTING CERTIORARI

Without any cogent argument or citation of authorities to support its position,[2/] MSHDA states in a

[2/] MSHDA's reliance on the Federal Power Commission and Federal Trade Commission (cases cited at p. 7 of its brief) is misplaced. These cases are factually distinguishable. The petition in Fed. Trade Comm'n v. Minn. Honeywell Regulator Co., 344 U.S. 206 (1952) (Cont.)

conclusionary manner that Petitioners have shown no basis for granting a Writ of Certiorari. To the contrary, the petition presents special and important reasons for this Court to grant the Writ of Certiorari within the purview of Rule 19.1(a) and (b).[3/] See Petition at p. 23 - 65.

MSHDA's assertion (MSHDA Br. p. 8-9) that Petitioners tacitly admit that Warth v. Seldin, 422 U.S. 490 (1975) is conclusive to Petitioners' alleged lack

[2/] (Cont.) was untimely because the petitioner did not file a timely petition for rehearing. 344 U.S. at p. 213. The petition in Fed. Pow. Comm'n v. Idaho Pow. Co., 344 U.S. 17 (1952)(at pp. 19-20) was held timely because the petition for rehearing was entertained and considered on the merits. 344 U.S. at p. 21.

[3/] This case involves allegations of segregation occurring within Federal and MSHDA housing programs and federally supervised to achieve national housing objectives. See note 5, infra. The Detroit News articles demonstrate the importance of the questions presented by the petition.

of standing defies comprehension. To the contrary, throughout the proceedings below and in their petition, they assert that Warth v. Seldin is distinguishable and not apposite to the issues raised on appeal. (Petition pp. 30-33).

Furthermore, MSHDA purports to rewrite the decision of this Court in Hills v. Gautreaux, 425 U.S. 284, 96 S.Ct. 1538 (April 20, 1976) and the Third Circuit's decision in Shannon v. HUD, 436 F.2d 809 (3rd Cir. 1970) by asserting that neither the factual nor the legal issues involved therein are remotely similar to the case at hand. Nothing could be more inaccurate. See Petition at pp. 23-30 and the lower court decisions cited in the Hills case.

This transparent revision reflects MSHDA's consistent reluctance to accept

this Court's premise in the Hills case that this Court will not countenance racially discriminatory public housing practices by HUD or any public housing authority. The focus of the Hills decision was a blanket proscription against discrimination in federal and state assisted housing projects.

MSHDA's attempt to shift the Court's attention from the substantial and important questions presented by the petition exemplifies the flaw in MSHDA's opposition to the petition. If Warth v. Seldin could be rewritten to support MSHDA's contentions, then the legislative intent in enacting the various housing and civil rights acts and this Court's holding in the Hills case would

be completely frustrated.[4] In substance, MSHDA asks this Court to countenance apartheid in the HUD and MSHDA assisted low to moderate housing programs in the ghetto areas of the City of Detroit, Michigan.[5]

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[4] The questions presented in the petition are of great public importance, particularly to participants and recipients under the federally assisted Section 236 (Rehab) program. The $33.2-million housing waste should be an embarrassment to MSHDA and Federal Respondents. See petitioners' Reply, pp. 8-14, supra.

[5] The National Housing objectives which guide HUD's administration of federal housing laws are found in a number of statutes to be read in pari materia. Shannon v. HUD, 436 F.2d at 817. See 42 U.S.C. 3601, 1401, 1402(2), 1437, 3608(d)(5), 2000d and 5301(c)(6). The Second Annual Report on National Housing Goals of the President says:

"It is imperative to reverse the trend toward a society that is becoming geographically divided not only on a racial basis but on economic and social basis as well. There must be an end to the concentration of the poor in land-short central cities and their inaccessibility to the growth of employment opportunities in suburban areas." House Document No. 91-292, 91st Cong. 2d Sess., U.S. Govt. Printing Office, April 2, 1970, pp. 20-21.

Federal Respondents, by opposing the petition only on a procedural ground, have implicitly confessed the merits of the Petition for Writ of Certiorari. Hence, the importance and substantiality of the questions presented have not been denied by Federal Respondents.

In light of the inability of MSHDA to face the issues presented in the petition without grossly distorting the application of Warth, Hills and Shannon, the need for plenary review of the judgment and opinion below is indisputable.

Although MSHDA asserts that the only real claim presented is that this Court assist Petitioners' efforts to delay foreclosure of the mortgage which has been in default since 1972, approximately two years later MSHDA has not

taken one step in an attempt to prosecute its foreclosure action. The failure of MSHDA to act on its frivolous foreclosure action is understandable since as of 1975 the only Section 236 (Detroit Rehab) Project against which MSHDA and HUD had commenced foreclosure proceedings was the Second-Hendrie Project. See Petitioners' Reply, pp. 6 and 7, supra. All of the other MSHDA/HUD assisted Section 236 (Detroit Rehab) Projects are substantially owned, controlled or administered by whites, and although they have been in default for years, no foreclosure proceedings have been instituted by MSHDA against these whites.[6/] These practices by MSHDA

6/ Compare foreclosure action taken by MSHDA/HUD against Young, a black, with the HUD work-out plan for Henry Ford II et al. See Petitioners' Reply, pp. 12 - 14, supra.

are claimed by Petitioners to be violative of the housing and civil rights acts and U.S. Const. Ams. XIV and XV. See Petitioners' Reply, pp. 6 and 7, supra. Also, see Petition, pp. 4-16.

As MSHDA well knows, it has no reasonable basis for opposing the petition and its opposition is an attempt to continue its illegal and unconstitutional racially discriminatory housing practices in the ghetto areas of the City of Detroit or the Metropolitan area of the City of Detroit.

The effect of the judgments and decisions below, which were expressly or implicitly based in substantial part on political, economic and social concerns neither raised in the pleadings nor supported by a scintilla of

evidence in the record, constitute a deprivation of Petitioners' rights, privileges or immunities afforded under U.S. Const. Ams. V and XIV.[7/]

It is well recognized by this Court that courts have an obligation to insure that constitutional bounds are not overreached. While acting as judges, courts may not act in the same manner as legislators. Courts are not representative bodies and are not designed to be reflective of a democratic society. Their essential

7/ Petitioners submit that the judgment and opinion below will hamper the congressionally mandated objectives of the HUD/MSHDA Section 236 (Det Rehab) programs. Without intervention by this Court, MSHDA and HUD will continue their discriminatory housing practices in $33.2-million program fiasco in a desperate attempt to preserve and perpetuate apartheid in HUD/MSHDA assisted low to moderate housing programs.

quality is detachment founded upon independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.[8/] Cf. Dennis v. U.S., 341 U.S. 494, 525, (1971) (Frankfurter, J., concurring in affirmance).

8/ This is a case of far-reaching effect and importance. The evils of apartheid in HUD/MSHDA assisted low to moderate housing programs -- whether the results of illegal and unconstitutional conduct of HUD/MSHDA et al or the result of judicial abuse of discretion -- constitute a clear perversion of the legislative intent of the civil rights and housing acts. Compare Mr. Justice Brennan's dissenting opinion in Simon and Mr. Justice Marshall's plurality opinion in Hospital Building, cited at pp. 43-44 of the petition.

CONCLUSION

For the reasons set forth above as well as those contained in the Petition for Writ of Certiorari, Petitioners pray that this Court grant the Petition and review the judgment and opinion below.

Respectfully submitted,

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